



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI

CAUSE NO 676 'B' OF 2014

GIDEON KARANI NJINE.....CLAIMANT

VERSUS

RIFT VALLEY RAILWAYS.....RESPONDENT

JUDGMENT

1. The claimant brought this suit on 25/4/2014 contending that he was unfairly dismissed from employment by the respondent on 3/12/2013 and prayed for the following reliefs:

- a) Special damages amounting to Kshs.1,131,912
- b) General damages
- c) Costs of the suit
- d) Interest on (a) and (b) above at court rates until payment in full.
- e) Any other and/or further relief that this Honourable Court may deem just and fit to grant.

2. The respondent admitted that she dismissed the claimant from service but denied that the dismissal was unfair. She averred that the dismissal was justified and procedurally fair because the claimant had absented himself from work without permission, and that he was accorded a disciplinary hearing by a committee before the dismissal. She therefore prayed for the suit to be dismissed with costs.

3. The issues for determination are whether the dismissal of the claimant was unfair and whether the reliefs sought in the claim should be granted. When the suit came for hearing on 1/4/2019, the claimant testified as CW1, but the respondent never attended to prosecute her defence. Likewise after the hearing the claimant filed written submissions but the respondent never did so.

Claimant's case

4. The claimant adopted his written statement as his testimony and produced 12 documents to support his claim. He stated that he was employed by the respondent on 16/3/1992 as a semi-skilled staff but on 12/10/1992 he became a Trainee CXR Fitter III. On 25/10/2006 he became Artisan Chargehand and on 9/7/2009 he was confirmed in that position with a salary of Kshs. 53,300 per month. That among other duties allocated to him, he was responsible for the welfare of his juniors as well as protecting the property of the respondent.

5. On 25/11/2013, he received information that some staff members had been arrested for stealing company property. He then reported the matter to the Senior Human Resource Officer madam Carol. That after his morning duties he visited Railways Police Station and found that the employees had been taken to Court. He then went back to notify madam Carol and proceeded to court to confirm the charges levelled against them. He returned to work at 3.30 p.m. but madam Carol told him not to resume duty. On 27/11/2013 he received a letter requiring him to explain the events of 25/11/2013 and why he absented himself from work without permission.

6. CW1 further stated that he gave a detailed written explanation as required after which he was invited for an oral hearing before a Disciplinary Committee on 28/11/2013. That after hearing he was told to stay away from work and after one week he was called to collect a dismissal letter citing the reason for the dismissal as facilitating the release of suspected OTV thieves.

7. He denied the alleged offence and contended that the dismissal was not justified. He denied the absence from work and stated that his court attendance was serving the interest of the respondent and not to secure the release of the suspected thieves. He further contended that

the disciplinary hearing was rushed and therefore unfair because he was denied a chance to prepare and answer the allegations levelled against him.

8. In his written submissions, he framed the following three issues for determination:

- a) Whether the termination of the claimant's employment was unfair and unlawful;
- b) Whether the claimant is entitled to the reliefs sought;
- c) Who bears costs of the suit.

9. On the first issue, the claimant submitted that the respondent did not prove his defence and as such the dismissal is not justified and the procedure followed was unfair. He contended that the reason for the termination was not valid because he attended court as a supervisor of the arrested employees because it was in the interest of the respondent to do so. He therefore contended that his court attendance to check on the status of the criminal matter, and employees who had been arrested as their immediate supervisor, constituted a lawful cause that justified his absence from work. He further submitted that he never secured the release of arrested employees and that the respondent has failed to prove that by evidence.

10. As regards the procedure followed, the claimant submitted that the disciplinary process was rushed through without giving him sufficient time to prepare his defence on the allegations levelled against him. He contended that the dismissal was procedurally unfair and not in accordance with equity and justice as required by section 41 of the Employment Act. He relied on **Antony Mkala Chirari Vs. Malindi Water Sewerage Co. Ltd. [2013]eKLR**, to emphasize the right to hearing before dismissal.

11. Finally, the claimant relied on section 49(1) of the Act to pray for compensation for unfair termination.

Analysis and determination

12. There is no dispute that the claimant was employed by the respondent until 3/12/2013 when he was dismissed summarily. The issues for determination remains the same as framed herein above, that is:

- a) Whether the dismissal was unfair and unlawful;
- b) Whether the reliefs sought should be granted.

13. As correctively submitted by the claimant, under section 41 and 45 of the Employment Act, termination of employment is unfair if it is not grounded on a valid and fair reason and if it is done without following a fair procedure. A valid and fair reason must relate to the employee's conduct, capacity and compatibility or based on employer's operational requirements. Fair procedure on the other hand involves explaining the reason to the employee and accord him a chance to defend himself before the dismissal.

Reason for dismissal

14. Under section 47(5) of the Act, the burden of proving unfair termination lies with the employees who claims to be so terminated while the employer has the burden of justifying the reason for the termination.

15. In this case, the reason for termination was communicated in the show cause letter dated 26/11/2013 and the dismissal letter dated 3/12/2013. The former letter stated that:

"It is alleged that you committed the following offences:

In that on 26th November 2013, you absented yourself from duty without permission from your immediate supervisor and proceeded to court to secure release of Duncan Mulwa Musyoka and Solomon Kamau Maina, staff that were caught by guards manning the central workshop gate stealing the property of RVR without gate pass."

16. The dismissal letter stated that:

".... on November 26,2013, you absented yourself from work without permission and went to attend to employees who had been arraigned in court for alleged criminal offence to the substantial detriment of the company property."

17. The claimant admitted in evidence that he indeed went to court on 26/11/2013 to check on the status of the criminal case and see the accused employees who worked under his supervision in the company. He however explained that he never went to the court to facilitate the release of the accused employees but to represent the interest of the company because the accused persons were working under his supervision.

18. He further contended that he notified madam Carol, the senior Human Recourse Officer before going to the court. M/S Carol never filed any witness statement or testified in court to dispute the claimant's allegation that he notified her that he was going to court.

The foregoing notwithstanding, this court is not persuaded by the evidence tendered by the claimant because he admitted in evidence that

when returned from court at 3.30 p.m. and the Senior Human Resource Officer, madam Carol barred him from resuming duty.

19. The said conduct by the Senior Human Resource Officer corroborated the defence by the respondent that the claimant absented himself from work without permission. It is irrational to imagine that madam Carol could permit the claimant to be away from his work station and hours later suspend him for absenting himself from work without permission.

20. Under section 44(4)(a) of the Employment Act, absence from work without permission constitutes gross misconduct. The said section provides that the employer is entitled to dismiss his employee summarily if the employee:

“(a) without leave or other lawful course, an employee absents himself from the place appointed for the performance of his work; ”

21. Although the claimant testified that he attended the court for the interest of the company, the court is not persuaded that indeed the claimant was in the court for the best interest of the employer. He has not proved by evidence that it was within his job description to attend court on behalf of the company to ensure welfare of the employees including those under lawful custody for alleged criminal conduct.

The procedure followed

22. The claimant admitted in evidence that he was served with show cause letter dated 27/11/2013 inviting him to explain his absence from work without permission on 26/11/2013. He further admitted in his testimony that he gave a detailed written explanation and thereafter he was called to an oral hearing before a disciplinary committee on 28/11/2013 where he tendered his defence. He however contended that the speed with which the disciplinary process was conducted prevented him from adequately preparing his defence against all the allegations levelled against him and as such the procedure was unfair.

23. This court has considered the evidence by the claimant and found that it supports the fact that a fair procedure was followed. The claimant was accorded an opportunity to defend himself in writing and later orally before a disciplinary committee. He never raised any objection against the speed in which the disciplinary process was being done. It is therefore an afterthought to allege that he was prevented from preparing his defence by the speed with which the process was done.

24. All what section 41 of the Employment Act required is that, before terminating the employees contract of service for misconduct, the employee must be made aware of the charges levelled against him and then be given a chance to defend himself. In this case the claimant was notified of the offence he committed and thereafter invited to air his defence both in writing and orally before a committee.

25. Considering the finding herein above that the claimant has failed to prove on a balance of probability that the reason cited for his dismissal was not valid and fair, and that a fair procedure was not followed, I return that the claimant failed to discharge his burden of proving that he was unfairly dismissed as required under section 47(5) of the Act.

Relief

26. The claimant prayed for special damages amounting to Kshs.1,131,912. No particulars were pleaded to inform the court how the said sum was arrived at, and no evidence was tendered to prove the same. It is a well settled principle of law that special damages must not only be specifically pleaded but must also be proved by evidence. Consequently, I dismiss the whole claim for special damages for lack of particulars and evidence.

27. The claimant has further prayed for General damages, but again no evidence was led to prove that claim. Consequently, it is dismissed for lack of merits.

Conclusion and disposition

28. I have found that the claimant has failed to prove that he was unfairly and unlawfully dismissed by the respondents from service. I have further found that the claimant is not entitled to the reliefs sought in his suit. Consequently, I dismiss the suit with no order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 27th day of September, 2019

ONESMUS N. MAKAU

JUDGE